



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Stic-Adhesive Products Company, Inc.  
**File:** B-227162  
**Date:** September 25, 1987

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### **DIGEST**

1. Protest against parallel contracting (i.e., division of award between two low offerors) is sustained where contracting agency fails to demonstrate reasonable basis for its choice of this method of award.
2. Protest against agency's use of negotiation procedures rather than sealed bidding is denied where agency reasonably decided to make parallel awards to the two low offerors and, as a result, award would not be based on lowest price, as is required where sealed bids are used.
3. Protest that multiple award schedule should have been issued is denied where specification for item exists and selectivity is not necessary for ordering offices to meet their needs.
4. Contracting agency is not required to include minimum order guarantee in requirements contract. Agency's agreement to procure a specified percentage of its requirements constitutes adequate consideration, and inclusion of estimated quantities in solicitation provides a reasonable basis for offerors to prepare price proposals.

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### **DECISION**

Stic-Adhesive Products Company, Inc. protests the proposed method of award for items 1 through 10 of request for proposals (RFP) No. 10PR-XXS-4245, issued by the General Services Administration (GSA) for nonflaming enamel. The RFP provides for the award of parallel contracts to the two low offerors on each of the 10 items. Stic-Adhesive primarily objects to the use of parallel contracting, which it claims is intended to prevent it from receiving award of the entire requirement for certain items. We sustain the protest in part and deny it in part.

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Items 1 through 10 of the RFP contemplate the award of parallel requirements contracts for delivery of three colors of nonflaming enamel to several locations. The contracts are to meet the needs of federal agencies using GSA as a supply source for the period of July 1, 1987, or date of award, to June 30, 1988. The Navy is apparently the primary user of the nonflaming enamel, which is applied to the interior walls of ships. According to GSA, nonflaming enamel is considered critical to the safety of shipboard personnel in case of fire since it does not contribute to spread of the fire.

The RFP provides for award on an item by item basis. The low acceptable offeror for an item will be awarded 60 percent of the government's requirements, and the second low acceptable offeror will be awarded the remaining 40 percent. The RFP requires that each successful offeror possess the production capacity to supply the total estimated requirements for each line item, and the government reserves the right to award the total requirements to the low offeror if the second low offeror's price is not determined to be fair and reasonable or if only one offer is received. The RFP also provides that orders will be placed with the secondary contractor in the event that the primary contractor defaults on individual orders or the entire contract.

Stic-Adhesive objects to the use of parallel contracting, arguing that it is not in the government's best interest to procure from a source other than the lowest-priced offeror. Stic-Adhesive further argues that prospective contractors will offer higher prices in response to a solicitation under which they might receive award of 40 percent of the government's requirements than they would in response to a solicitation for 100 percent of the government's requirements.

We do not agree with Stic-Adhesive that parallel contracting is objectionable in principle since the benefits of obtaining more than one source could in certain situations outweigh anticipated increases in prices. See American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 CPD ¶ 316. As discussed below, however, we do not think that GSA has adequately justified paying premium prices for enamel in order to have additional sources of supply for that item.

GSA contends that the nonflaming enamels have a history of poor supplier performance, and that a lapse in contract coverage could threaten the safety of shipboard personnel and cause delays in shipyard schedules. It argues that by permitting the sharing of large orders, which might overtax an individual manufacturer's production capacity, parallel contract coverage would virtually eliminate the possibility

of shortages of material, and that the benefits of this type of award would therefore outweigh any potential increase in proposed prices. As support for its argument that parallel awards are necessary to ensure a continuous supply of the enamel, GSA notes that five of the six contractors who have supplied the enamels over the course of the past 3 years have been significantly delinquent in their performance. For example, the firm which held a contract for 7 of the 10 items for the period of September 1986 through June 1987 was delinquent on 81 percent of its orders. According to the agency, only Stic-Adhesive, which held a contract for three other items for the same contract period, has performed satisfactorily.

Although it thus is clear that GSA has encountered a number of deficiencies in contractor performance in recent years, the record does not reveal that the delinquencies were the result of large orders that overtaxed the contractors' production capacity. On the contrary, the performance problems related to matters such as nonconformance with the specification, problems in obtaining pigments, and a dispute over the flash point temperature test method, which was resolved in the contractor's favor. Except possibly for the problem in obtaining pigments, the procurement history of the enamels does not establish that the government's placement of large orders has been the cause of delinquencies in the past. Thus, we do not think it is reasonable for GSA to conclude that dividing potentially high volume orders between two contractors through parallel awards will eliminate the performance problems GSA has had with prior contractors.

Further, even if GSA had a reasonable basis to question the potential offerors' capability to handle high volume orders, it is impossible to determine prior to the receipt of offers whether any particular manufacturer will be in line for award of multiple items in quantities which might tax its production capacity. If, for example, an offeror with a monthly production capacity of 25,000 gallons were in line for award only on item 1, for which the estimated monthly requirement is 4,108 gallons, there would be little cause for concern regarding overtaxing its production capacity. Under the current RFP, however, such an offeror would receive only 60 percent of the award for that line item even though it has sufficient production capacity to handle the entire requirement. In our view, a parallel award is not justified in that situation based solely on GSA's concern regarding inadequate production capacity.

Since the record does not show that the history of poor performance necessarily was due to making awards exceeding the contractors' production capacity, and GSA will not know until it examines the offers actually received under the RFP whether there is any current basis for concern about a particular offeror's capacity, parallel awards clearly are not warranted in all cases under the RFP. This does not mean that parallel awards under the RFP would never be justified under any circumstances, however; on the contrary, parallel awards may become appropriate if GSA reasonably concludes, based on the offers actually received, that award of the entire requirement for one or more of the line items to the lowest priced offeror would tax its production capacity.

With regard to Stic-Adhesive's allegation that GSA's use of parallel contracting is intended to prevent it from receiving award of the entire requirement for certain items, where a protester alleges that procurement officials have acted intentionally to preclude it from receiving an award, the protester must show that the officials had a specific and malicious intent to harm the protester, since contracting officials are otherwise presumed to act in good faith. The Bid Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218. Stic-Adhesive has presented no such evidence. Although Stic-Adhesive alleges that GSA's decision to make parallel awards is part of an ongoing effort by the agency to avoid doing business with it, there is no evidence in the record to suggest that GSA intends to exclude Stic-Adhesive from competing under the RFP.

Stic-Adhesive also protests the use of negotiation procedures rather than sealed bidding for the procurement. Under the Competition in Contracting Act of 1984 (CICA), agencies are required to obtain full and open competition and to use the competitive procedures or combination of competitive procedures best suited under the circumstances of the procurement. 41 U.S.C. § 253(a)(1) (Supp. III 1985). In determining the procedures appropriate under the circumstances, the agency is required to solicit sealed bids only if, among other factors, award will be made based on lowest price as determined under the solicitation's evaluation factors. See 41 U.S.C. § 253(a)(2)(A)(ii); Adrian Supply Co.--Reconsideration, B-225440.2, Mar. 30, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-1 CPD ¶ 357. Since, in this case, the RFP provides that award will be made to both the lowest and the second lowest priced offeror, the award clearly will not be made solely on the basis of lowest price. Accordingly, GSA could not properly use sealed bidding under CICA, 41 U.S.C. § 253(a)(2)(A)(ii).

The protester also argues that if more than one source of supply is required, multiple award schedule contracts should be issued pursuant to Part 38 of the Federal Acquisition Regulation (FAR), 48 C.F.R. Part 38 (1986). The FAR provides that multiple award schedule contracts are appropriate when either (1) it is not practical to draft specifications or other descriptions of the required supplies or services and there are multiple suppliers able to furnish similar commercial supplies or services, or (2) selectivity is necessary for ordering offices to meet their varying needs. FAR, 48 C.F.R. § 38.102-2(b). Neither circumstance is present here: a specification for the non-flaming enamel exists, and since enamel produced in accordance with the specification will meet the needs of all ordering offices, selectivity is unnecessary.

Finally, the protester challenges GSA's failure to include a minimum order guarantee in the RFP, arguing that it deprives offerors of a reasonable basis on which to prepare their price proposals and that any resulting contract will lack mutuality. We find this argument to be without merit. Minimum order guarantees need not be included in a requirements contract; rather, the agency's agreement to procure a specified percentage of its requirements constitutes adequate consideration. See Sentinel Electronics, Inc., B-221914.2, et al., Aug. 7, 1986, 86-2 CPD ¶ 166. In addition, the inclusion of estimated quantities in the RFP provides a reasonable basis for offerors to prepare their price proposals. See Duroyd Mfg., Co., B-213046, Dec. 27, 1983, 84-1 CPD ¶ 28.

Since we find that GSA has not shown a reasonable basis for making parallel awards in all cases under the RFP, we recommend that GSA revise the RFP to delete the current provision for parallel awards. As discussed above, however, we recognize that parallel awards may become appropriate based on the actual offers received. Accordingly, if GSA wishes to retain the option to make parallel awards if the circumstances warrant, we recommend that GSA revise the RFP to include a provision similar to the one used by the agency in American Bank Note Co., B-222589, supra, reserving the right to make parallel awards to other than the lowest priced offerors in order to ensure a continuous supply of the enamel. In addition, since we sustain the protest on this ground, Stic-Adhesive is entitled to recover the costs

of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1987).

The protest is sustained in part and denied in part.

*for* *Harry R. Chu Chue*  
Comptroller General  
of the United States